UNITED
NATIONS

AT

Administrative Tribunal

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8 November 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 544

Case No. 553: LUKAS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Arnold Kean; Mr. Luis de Posadas Montero;

Whereas at the request of Ellen Lukas, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 July 1990 the time-limit for the filing of an application to the Tribunal;

Whereas, on 11 June 1990, the Applicant filed an application containing the following pleas:

"Section II: Pleas

1. That the UNAT [United Nations Administrative Tribunal] concur in the decision of the United Nations Joint Appeals Board, dated 28 February 1990, the pertinent portion of which reads as follows (...):

'57. The Panel recommends, in view of the unfortunate manner in which the selection process was handled and the unfairness resulting to the Applicant therefrom, and in view of the appellant's competence and experience, that DPI [Department of Public Information] make substantial efforts, promptly, to locate a suitable P-4 post for the appellant.'

2. That the UNAT direct the Secretary-General to carry out promptly his own approval of that decision as communicated to Ms. Lukas in his (Mr. J. Richard Foran's) letter of 13 March 1990, paragraph 3:

'The Secretary-General has accordingly decided to maintain the contested decision. The Secretary-General has further decided to give full and fair consideration to you on a priority basis for any vacant and suitable P-4 post for which you are qualified and interested, taking into account the entire circumstances of your case, and to take no further action on the matter.'

3. That the UNAT carefully review all of the material submitted to and considered by the Joint Appeals Board, including the question of whether the Secretary-General did not violate his own rules and procedures in failing to select and promote to the then existing vacancy from the 'short list' of three candidates certified as acceptable.

4. That the UNAT further examine the record carefully and determine whether it is not apparent that nationality and/or other extraneous factors were not added in the middle of the process which, de facto, constituted prejudice to the career advancement of a fully qualified candidate who should have in all fairness and equity been promoted."

Whereas the Respondent filed his answer on 7 June 1991;

Whereas, on 15 August 1991, the Applicant filed written observations in which she amended her pleas as follows:

"AMENDED PLEAS

18. In view of the above considerations, Applicant respectfully requests the Tribunal:

19. To order the USG[Under-Secretary-General]/DPI to carry out at once the decision of the Secretary-General with regard to the Applicant given on 13 March 1990, and reiterated in a memorandum from the ASG [Assistant Secretary-General] for OHRM [Office of Human Resources Management] (...) and a memorandum from the Officer-in-Charge, A&M [Administration and Management] (...).

20. To find that the Applicant between 1990 and August 1991 was three times wrongfully denied priority consideration for a P-4 post in which she was interested and qualified. These include the post (still-vacant eleven months after it was first advertised) of Palestine Information Officer, Anti-Apartheid, Namibia and Palestine Information Programmes, CPMD[Communications and Project

Management Division]/DPI; the presently-encumbered post of Information Officer, Office of the Director, Information Products Division, DPI; and the presently-encumbered post of Chief, Committee Liaison Unit, Office of the USG/DPI, despite the Secretary-General's decision that she be given priority consideration for any P-4 post in which she was interested and qualified, because of personal bias on the part of the USG/DPI.

20. To order that the Applicant be immediately appointed to the still-vacant post for which she applied on 26 November 1990 (the P-4 Palestine Information Officer post, Anti-Apartheid, Namibia and Palestine Programmes), since this was the first DPI P-4 post to be advertised after the Secretary-General's decision to accept the JAB [Joint Appeals Board] recommendations and accord her priority consideration.

21. To order that Applicant's promotion to the P-4 level be made effective 8 March 1989, the day when, after 13 years of fully satisfactory service without ever having been promoted, she was denied promotion to the post of Human Rights Information Officer, ESDHR[Economic and Social Development and Human Rights Programmes Section]/CPMD, DPI, (UNA-27773-E-Pr-002) which functions she had performed for 18 months.

22. To order that the Applicant's promotion to the P-4 level be made effective to 8 March 1989 for humane reasons. The Applicant is near retirement. Since pensions are based on grade level over the last 36 months of a staff member's service, the USG/DPI's delay in carrying out the JAB's recommendation has already had serious negative effects on her pension.

23. To award one full year's salary at the P-4 level to the Applicant in compensation for the decision of the USG/DPI to this date not to give the Applicant priority consideration for the following posts: Palestine Information Officer, Anti-Apartheid Namibia and Palestine Information Programmes, DPI/CPMD; Chief, Committee Liaison, OUSG[Office of the Under-Secretary-General]/DPI, and Information Officer, Office of the Director, IDP[Information Products Division]/DPI. As of the present writing, bearing in mind the time required to submit an appeal to the JAB, Applicant is awaiting the reply of the Secretary-General to her request that the Palestine post (No. UNA-27773-E-P4-004) be frozen until such time as the Tribunal has rendered its decision. This would preclude a moot outcome to any remedy which the Tribunal might take.

24. In view of the extraordinary nature of the situation in which a clear decision of the Secretary-General was disregarded by the USG/DPI, and as a compensation to the Applicant for her moral injury during the long delay of the settlement of her case, to award the Applicant an additional one year's net base salary."

Whereas the Applicant submitted an additional written statement and additional documents on 30 September 1991;

Whereas, on 18 and 23 October 1991 respectively, the Respondent and the Applicant provided additional information at the request of the Tribunal;

Whereas the Applicant submitted an additional document on 23 October 1991;

Whereas the Respondent submitted an additional written statement on 28 October 1991;

Whereas, on 5 and 7 November 1991 respectively, the Applicant and the Respondent submitted additional written statements and additional documents;

Whereas the Applicant submitted an additional written statement and an additional document on 8 November 1991;

Whereas the facts in the case are as follows:

The Applicant, a United States national, served the United Nations from 1969 to 1972 as an Information Officer and was re-employed in the same capacity by the Organization on 15 November 1976 under a fixed-term appointment at the P-3 level which was extended from time to time and converted to a probationary appointment on 15 April 1979. On 1 February 1980 she was granted a permanent appointment in the Department of Public Information (DPI).

In its 1986 report to the General Assembly (A/41/49), the Group of High-level Intergovernmental Experts (Group of 18) recommended in its Recommendation 37 that "a thorough review of the functions and working methods as well as of the policies of the Department of Public Information should be conducted, with a view to bringing its role and policies up to date in order to improve the capacity and ability of the Department to provide information on United Nations activities as approved by the intergovernmental bodies". In its resolution 41/213 of 19 December 1986, the General Assembly decided that the recommendations, as agreed upon, should be implemented by the Secretary-General and the relevant organs and

bodies of the United Nations. It further decided that, in carrying out his mandate, the Secretary-General should bear in mind Recommendation 15 of the Group of Experts, which it had also approved, regarding the proposed reduction by 15 percent of the overall number of regular budget posts, particularly at the higher levels. A restructuring plan was accordingly prepared by DPI and approved by the Secretary-General. Under that plan, a number of organizational units were to be replaced by new organizational units and the posts and resources allocated to the old units were to be reallocated to the new units. Furthermore, the number of posts in DPI was to be reduced by 108 from a total of 770, a reduction of 14%. The restructuring plan was reviewed by the Committee for Programme and Co-ordination (CPC) at its twenty-eighth session, held from 2 May to 3 June 1988. In its report (A/43/16), the CPC recommended that separate sections should be clearly identified in the Communications and Project Management Service for co-ordinating and undertaking the necessary work relating to (a) issues of economic development and (b) issues of human rights and social development (para. 83). The CPC also recommended that the Secretary-General should accelerate the process of achieving a balanced geographical distribution of posts in DPI, particularly at the senior level (para. 86). The CPC's recommendations were adopted by the General Assembly in its resolution 43/213 of 21 December 1988.

In the meantime, the Under-Secretary-General for Public Information had, on 8 April 1988, sent to all DPI staff members at the Professional level and above a memorandum on "DPI Restructuring" reading in part:

> "Now that the new staffing table for the Department has been approved (see Annex I), the next step in the restructuring of DPI will be to select staff to fill Headquarters posts at the Professional levels and above (P-2/1 through D-1). This process will be carried out in accordance with the attached procedures (see Annex II), approved jointly by the Assistant Secretary-General for Human Resources Management and myself, following discussions between representatives of the Department and of the Office for Human Resources Management, which have also included DPI staff representatives.
>
> 2. As you will see from the procedures there will be three rounds of internal DPI advertising for posts at the

P-2/1 through P-4 levels, for which only qualified DPI staff may apply, and of Secretariat-wide advertising for posts at the P-5 and D-1 levels. These two groups of posts are being treated differently in accordance with the retrenchment procedures to be applied to the Secretariat as a whole.

..."

Annex II to the memorandum described the procedures to be applied towards selecting staff to fill Headquarters posts at the Professional level and above under the new staffing table. It read in part:

"...

Designations of posts for advertising and selection purposes

2. Reflecting the ongoing reorganization and restructuring of the Department, current posts have been designated as:

(a) continuing posts, whose functions will be continued under the new staffing table; and

(b) posts to be discontinued.

...

4. Posts to be discontinued under the present table will be either converted to new posts, i.e., posts with new functions, under the new staffing table or abolished.

Initial Status of DPI staff

5. All DPI staff members currently occupying continuing posts having the required or a smaller number of incumbents will be placed against these posts under the new staffing table. All other DPI staff will need to apply for the balance of posts under the new staffing table, which will be advertised.

Advertising of posts at the P-2/1 through P-4 levels

6. For posts at the P-2/1 through P-4 levels, there will be three rounds of internal advertising, to which only DPI staff may respond:

(a) in the first round, all new posts (posts with new functions) will be advertised together with all vacant continuing posts;

(b) in the second round, all vacancies resulting from (a) above will be advertised together with all continuing posts for which, at that time, there are still potentially too many incumbents (scheduling the advertising of posts for which there are potentially too many incumbents in the second round is likely to eliminate some of the over-encumbered situations. When this occurs, the remaining incumbents of the posts concerned will be placed against the new staffing table).

(c) in the third round, all vacancies resulting from the second round will be advertised.

7. After the three rounds of advertising and selection have been completed, any remaining staff will be considered automatically for any remaining vacancies, i.e. without needing to make further application.

8. The Department will then advise OHRM of staff remaining unplaced under the new staffing table so that these may be considered for posts under the Secretariat-wide vacancy management process. Those staff members will be dealt with in accordance with the Secretariat-wide retrenchment procedures.

9. Posts remaining unfilled after completion of the internal advertising/selection process will also be submitted to OHRM for, as appropriate:

(a) inclusion in the Secretariat-wide vacancy management process; and/or

(b) external recruitment, to be carried out without prejudice to internal applicants.

...

Review and selection process

13. An Ad-hoc Departmental Selection Committee, to be supported by a small secretariat, will review applications received for all posts advertised and:

(a) for posts at the P-2/1 through P-4 levels:

(i) review applications and establish shortlists of preferably not more than three applicants per post, for submission to the Under-Secretary-General; and

(ii) after three rounds of advertising and selection have been completed, make a final review of remaining staff and posts to determine whether any further shortlists can be established for submission to the Under-Secretary-General;

...

14. The Under-Secretary-General for Public Information will make the final selection of staff to fill all of the posts advertised.

..."

On 8 April 1988 the Applicant was advised that the post she was encumbering had been designated as a continuing post in the new staffing table; therefore, she would be placed immediately under the new staffing table as Information Officer in the Communications Services Section of the Communications and Project Management Service; at the same time, however, she was free to apply for other posts to be advertised under the new staffing table. In the second round of the selection procedure, which started on 8 November 1988, the Applicant applied for a P-4 post in the Human Rights and Development Programmes Section of the Communications and Project Management Service. She was short-listed for the post by the Ad hoc Departmental Selection Committee, along with two other candidates, both of whom were also United States nationals, but she was not interviewed or selected; nor were the other two short-listed candidates. On 5 May 1989 the post was advertised Secretariat-wide "due to the particular nature of the functions", the section to which the post belonged being renamed "Economic and Social Development and Human Rights Programmes Section". The Applicant again applied for the post but was not selected.

On 2 May 1989 the Applicant had requested the Secretary-General to review the administrative decision to re-advertise the post for which she had been short-listed, claiming that the decision not to implement the

recommendation of the selection panel not only violated the rules agreed on between the Department and the staff, but would have a direct negative impact on her terms of employment within the United Nations. On 19 May 1989 the Assistant Secretary-General for Human Resources Management replied that the Secretary-General had decided to maintain the decision to re-advertised the post; he explained that, having evaluated the qualifications of all the short-listed candidates, including the work-related experience factor, the Under-Secretary-General for Public Information had decided to re-advertise the post Secretariat-wide in order to seek additional candidates with experience in developing countries.

On 23 May 1989 the Applicant lodged with the Joint Appeals Board an appeal in which she requested under staff rule 111.2(f) that the filling of the post advertised as of 5 May 1989 be suspended. The Board held a summary hearing. On 13 June 1989, the majority of the Panel considering the matter recommended that a stay of administrative action be granted, while the minority recommended that the Applicant's request for a stay be denied. On 20 June 1989 the Applicant was advised that the Secretary-General had decided to take no action on her request on the grounds that she had not shown a likelihood that she would suffer irreparable injury if she was not granted a stay of administrative action since she was not precluded from being considered for the post in question in the third round of the DPI selection process. On 28 February 1990 the Joint Appeals Board submitted its report on the merits of the appeal. The Board's conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 55. The Panel concludes that although the selection process had certain shortcomings and reflected poor judgement on the part of management, the appellant has failed to sustain the burden of proving that the contested decision was motivated by extraneous factors, e.g., discrimination against the appellant because of her nationality, or personal prejudice.
>
> 56. The Panel concludes also that the contested decision did not, per se, constitute a violation of the Staff Rules, nor did it substantively violate the internal selection procedures of DPI.

57. The Panel recommends, in view of the unfortunate manner in which the selection process was handled and the unfairness resulting to the appellant therefrom, and in view also of the appellant's competence and experience, that DPI make substantial efforts, promptly, to locate a suitable P-4 post for the appellant."

On 13 March 1990 the Officer-in-Charge of the Department of Administration and Management informed the Applicant that, having re-examined her case in the light of the Board's report, the Secretary-General had decided to maintain the contested decision; the Secretary-General had further decided to give full and fair consideration to her on a priority basis for any vacant and suitable P-4 post for which she was qualified and interested, taking into account the entire circumstances of her case, and to take no further action on the matter. On 11 June 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. DPI changed the requirements of an advertised job in the middle of the selection process, thereby violating their own guidelines.

2. It was incorrect to consider geographic distribution in the promotion process.

3. Despite the unanimous recommendation of the Joint Appeals Board and the efforts of some members of the Administration on behalf of the Applicant, the Under-Secretary-General of DPI consistently denied the Applicant fair consideration for all vacancies for which she applied, thereby showing personal bias against the Applicant and defying the authority of the Secretary-General.

Whereas the Respondent's principal contentions are:

1. The Applicant's non-selection for promotion from a short-list of qualified candidates does not violate her rights as the Applicant received full and fair consideration for that promotion.

2. Job descriptions and vacancy announcements are within the discretionary power of the Secretary-General, and they may be changed and rewritten according to the changing needs of the service.

The Tribunal, having deliberated from 16 October to 8 November 1991, now pronounces the following judgement:

I. In response to a question put by the Tribunal, the Respondent has alluded to an issue of receivability although not raising it directly. The Tribunal finds that this dispute has previously been submitted to the Joint Appeals Board, which has communicated its opinion to the Secretary-General. The Tribunal further finds that the recommendations of the Joint Appeals Board were partially favourable to the Applicant and, although accepted by the Secretary-General, were not carried out. Accordingly the application, including the amended pleas which elaborate on it, is receivable under article 7 of the Tribunal's Statute.

II. The basic dispute in this case was whether the Applicant was treated unfairly as a consequence of the way in which the Administration carried out the selection process connected with a restructuring of DPI. In the Joint Appeals Board's report, unfairness against the Applicant was found and the selection process challenged by the Applicant was viewed as having been conducted in an unfortunate manner. Following the Joint Appeals Board's recommendations, a decision was taken by the Secretary-General and transmitted to the Applicant through a letter dated 13 March 1990. In this letter it was stated that "the Secretary-General has further decided to give full and fair consideration to you on a priority basis for any vacant and suitable P-4 post for which you are qualified and interested, taking into account the entire circumstances of your case...". It is clear that the Secretary-General's decision did not imply that a suitable P-4 post would necessarily be found for the Applicant, but it certainly called for efforts to be made in good faith to that effect and it also required those efforts to be made on a "priority basis". A failure to make such efforts within a reasonable period of time constitutes aggravation of the previous unfair treatment of the Applicant.

III. If substantial steps had been taken in good faith toward finding a suitable P-4 post for the Applicant on a priority basis, there would be no

ground for the Applicant's claim. But the evidence on record shows that, apart from certain expressions of good will which the Applicant mentions, the Administration did not take any such steps to implement the Secretary-General's promise for many months. This is implicitly admitted by the Administration in letters of 17 January 1991 and 5 June 1991, both of which inquire from the Under-Secretary-General for Public Information as to what steps she intends to take to implement the Secretary-General's promise, thus indicating that no definite steps had been taken in that direction since the Secretary-General's decision i.e. since March 1990. Beyond this, there is uncontested evidence regarding a conversation between the Applicant and the Under-Secretary-General which occurred on 11 April 1991 that the inaction was, at least in part, due to displeasure with the Applicant for having appealed to the Joint Appeals Board. The Tribunal considers this deplorable.

IV. This situation remained unaltered until September 1991 - fifteen months after the Applicant had filed her application to the Tribunal in June 1990 - when the Administration initiated conversations with the Applicant in order to reach a settlement by endeavouring to find her a post according to the Secretary-General's promise. These conversations led to the offer to the Applicant of post No. UNA-27-774-E-P4-003, at the P-4 level, an offer that was objected to by the Applicant on the ground that the functions of the post offered were identical to those she had been performing for the last ten years. The circumstances surrounding this offer cause the Tribunal to doubt whether it was made in good faith.

V. At best, this offer only partially fulfills the Secretary-General's commitment of March 1990. This commitment refers to a "suitable P-4 post for which you are qualified and interested". Although the post offered to the Applicant may be deemed to reflect some of the features mentioned in the Secretary-General's commitment, the Applicant's objection of lack of interest to her must be considered reasonable, since the post involves the same functions the Applicant has been performing until now. The offer must therefore be viewed as not fully discharging the Secretary-General's commitment.

VI. It is therefore the Tribunal's opinion that new efforts should be made in good faith to fulfill the Secretary-General's commitment and that, while the Applicant is not entitled to single out or to choose the post to be assigned to her, nevertheless the renewed efforts should take into consideration all the conditions mentioned by the Secretary-General when ordering that efforts should be made to have the Applicant placed in a "suitable P-4 post for which you are qualified and interested". It appears from information received from the Respondent by the Tribunal that promotion of the Applicant to the P-4 level has already taken place. However, this should not affect the renewed efforts referred to in this paragraph.

VII. The Applicant also requests the Tribunal to determine "whether the Secretary-General did not violate his own rules and procedures in failing to select and promote to the then existing vacancy from the 'short list' of three candidates certified as acceptable" and whether "nationality and/or other extraneous factors were not added in the middle of the process which, de facto, constituted prejudice to the career advancement of a fully qualified candidate". In this respect, it is the Tribunal's opinion that, although serious issues are raised by these contentions, the injury that the Applicant might have suffered on these grounds was duly considered by the Secretary-General and that his decision had in view the redress of such irregularities as may have occurred.

VIII. Finally, the Applicant asks to be promoted to a particular P-4 post, effective March 1989. In the Tribunal's view, under the circumstances of this case, such a promotion cannot be ordered by the Tribunal. Any injury previously suffered by the Applicant is to be considered as compensated by the amount granted in the following paragraph.

IX. For the injury suffered by the Applicant as a consequence of her unfair treatment in connection with the Secretary-General's decision conveyed to her on 13 March 1990, the Tribunal orders the Respondent to pay to the Applicant one year of net base salary at level P-4, step VIII.

All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Arnold KEAN
Member

Luis de POSADAS MONTERO
Member

New York, 8 November 1991

Jean HARDY
Acting Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/545
12 November 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 545

Case No. 532: FALLAH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Samar Sen; Mr. Luis de Posadas Montero;

Whereas at the request of Rasmille Fallah, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September 1988, 30 December 1988, 31 March 1989, 31 May 1989, 30 June 1989, 31 October 1989, 30 November 1989 and 15 December 1989 the time-limit for the filing of an application to the Tribunal;

Whereas, on 15 December 1989, the Applicant filed an application the pleas of which read in part as follows:

"II. PLEAS

7. The Applicant respectfully requests the Administrative Tribunal:

A. Preliminary Measures

(1) To order the Respondent, pursuant to Article 10 of its Rules, to furnish the Applicant with the requisite documents as specified in her three separate requests duly transmitted to the President of the Tribunal, through the Acting Executive Secretary of the Tribunal, by her Counsel, vide his letter of 17 March 1989.

B. Substantive Measures

...

(11) To order the Secretary-General, pursuant to Article 9 of its Statute:

(a) To re-instate the Applicant in an Editorial Assistant post in ORES [Official Records Editing Section] at GS-7 level, retroactive from 1 January 1985, or place her against a GS-7 post in any Editorial Section of a Department or Office in the Secretariat to perform equivalent editorial functions, in view of the fact that the GS-5 post she had held as an Editorial Assistant in ORES had since been classified at the GS-7 level retroactive from 1 January 1985, by virtue of the fact that (1) she had passed the Editorial Assistant's examination with distinction; (2) she had completed 15 out of 24 months of her probationary assignment in ORES; and (3) she had thereafter performed equivalent editorial assistant's functions in Editorial Sections and other offices elsewhere in the Secretariat.

(b) To pay the Applicant a sum equivalent to the difference between the salary at GS-4 level she actually received and the salary she would have received at GS-7 level either in ORES had she remained there until the completion of her 24 months probationary assignment therein, or had she been placed on an equivalent post with comparable editorial functions in any Editorial Section elsewhere in the Secretariat, not only because that is the usual administrative procedure in similar cases, but it is the responsibility of the Administration in the cause of justice and equity.

(c) To pay the Applicant appropriate and adequate compensation for the loss of her SPA [Special Post Allowance] to GS-5 during the period from 1 August 1984 to 31 December 1984, following her return to her parent office in August 1984, or until the classification of her post at GS-7 level retroactive from 1 January 1985, to be

ordered by the Tribunal and implemented by the Respondent pursuant to the Plea under item (a) above.

(12) To award the Applicant appropriate and adequate compensation for severe moral injuries, excruciating pain and physical suffering inflicted upon her as a consequence of the cruel, inhuman and degrading treatment to which she had constantly been subjected by [the Chief of the Official Records Editing Section] with ulterior motives, thereby causing her severe stress related depression, anxieties and insomnia during her probationary assignment in ORES from 1 May 1983 to 31 July 1984 and continuously thereafter. She is still under medical treatment by both doctors for same illness.

(13) To recommend to the Secretary-General to take appropriate disciplinary measures against [the Chief of the Official Records Editing Section] and all other officials who wilfully took arbitrary and capricious actions against the Applicant, in clear abuses of their administrative powers and in wilful violations of her rights under the relevant provisions of the United Nations Charter, Staff Rules and Regulations, Administrative Issuances, Universal Declaration of Human Rights and other relevant international instruments on human rights, as well as Articles 11, 12, 13 and 14 of the Standards of Conduct in the International Civil Service, as strongly recommended by the United Nations Joint Inspection Unit in its Report on the Administration of Justice in the United Nations to the General Assembly at its 41st session (A/41/640, paragraphs 90 and 99).

(14) To hold oral proceedings on the case in order to hear the Applicant and other witnesses concerned, particularly the following:

...

(15) To award the Applicant as cost, the sum of $ 1,500.00."

Whereas the Respondent filed his answer on 7 August 1990;

Whereas, on 28 June 1991, the Applicant amended her pleas as follows:

"(12,a) To fix the amount of compensation for actual, consequential and moral damages to the equivalent of two years net base pay calculated at the GS-7 level together with interest from the period 1 August 1984 to the present."

"(15) To award the Applicant as cost, the sum of $ 3,500.000."

Whereas the Applicant filed written observations on 30 June 1991;

Whereas, on 18 September 1991, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the Tribunal requested additional information from the Respondent on 17 October 1991;

Whereas the Applicant submitted an additional written statement on 22 October 1991;

Whereas the Respondent provided on 28 October 1991 the additional information requested by the Tribunal;

Whereas the Applicant submitted an additional written statement and additional documents on 4 November 1991;

Whereas the facts in the case are as follows:

The Applicant, who had worked for the United Nations from 1965 to 1974 and for a short period in 1976, was re-employed by the Organization on 5 September 1977 under a short-term appointment as a Spanish Conference Typist at the G-3 level. On 28 December 1977 she received a fixed-term appointment for three months at the G-4 level as a Senior Clerk-Typist in the Office of the Director of the Translation Division, Department of Conference Services (DCS). Her appointment was extended from time to time and on 8 January 1980 she was transferred to the Office of the Under-Secretary-General, Department of Public Information (DPI). On 1 September 1980 the Applicant was transferred to the Special Unit on Palestinian Rights, Office of the Under-Secretary-General for Political and General Assembly Affairs (OUSGPGAA) and she was granted a probationary appointment which was converted to a permanent appointment on 1 June 1981.

On 1 May 1983 the Applicant, who had passed the competitive examination for editorial assistants on 14 January 1981 and whose name had been placed on a roster pending the availability of a post, was assigned as

an Editorial Assistant to the Official Records Editing Section, DCS, for a probationary period of two years with a Special Post Allowance to the G-5 level. By a memorandum dated 16 July 1984, however, the Applicant formally requested to be relieved of her duties as Editorial Assistant and to be reassigned to her former post effective 1 August 1984. Effective 1 August 1984 she was accordingly returned to OUSGPGAA as a Senior Clerk-Typist and her Special Post Allowance was discontinued.

The International Civil Service Commission having, in July 1982, approved the establishment of a seven-level grading structure (to replace the old five-level structure) for the General Service category in New York and promulgated job classification standards for the seven levels, all General Service posts in New York were classified under procedures set out in Administrative Instruction ST/AI/301 of 10 March 1983. As an outcome of the classification exercise, some posts were upgraded, including the post of editorial assistant previously occupied by the Applicant, which was reclassified at the G-7 level. The procedures for implementation of the results of the exercise were announced to the staff in Annex I of Information Circular ST/IC/86/27 of 28 April 1986. Under paragraph 16 of Annex I, a staff member who had completed the job description used to classify a post but had since been moved to another post could request a special review.

On 13 June 1986, pursuant to paragraph 16 of Annex I of Information Circular ST/IC/86/27, the Applicant wrote to the Assistant Secretary-General for Personnel Services to request a special review of her case. She stated that she had been forced to request to be reassigned to her former clerical post, classified at the G-3 level, because of "long-standing managerial problems" and "unpleasant encounters" with the Chief of Section which had made "working conditions unbearable". She asked to be considered not only for monetary compensation but, most importantly, for possible "relocation to an equivalent post" according to her qualifications. On 13 February 1987 the Applicant reiterated her request for a review of her case in a memorandum addressed to the new Assistant Secretary-General for Personnel Services.

A joint Implementation Review Group was established under Information Circular ST/IC/86/27/Add.2 of 28 August 1986 to conduct the special reviews and the Applicant's case was referred to it. In its report on the Applicant's case, the Group recommended that her request be denied and made the following comments:

> "After passing the Editorial Assistant examination, staff member went on assignment to DCS from April 1983 to August 1984 with an SPA [Special Post Allowance] to G-5. Staff member did not complete the required 2-year trial period and returned to her parent department in August 1984. SPA was discontinued.
>
> Staff member was therefore compensated for her assignment duties at the higher level and no further compensation is justified."

That recommendation was accepted on behalf of the Secretary-General and the Applicant was advised accordingly. On 16 June 1987 she requested a review of the administrative decision in a letter addressed to the Secretary-General in accordance with staff rule 111.2(a). Her request was acknowledged but not acted upon and on 15 December 1987, having received an extension of the time-limit for the filing of an appeal, she lodged an appeal with the Joint Appeals Board.

The Joint Appeals Board submitted its report on 23 June 1988. The Board's conclusions and recommendations read as follows:

> "Conclusions and Recommendations
>
> 34. The Panel concludes that the appellant did not sustain the burden of proof required to establish that she had been subjected to harassment and animosity during her 15-month stay in DCS.
>
> 35. The Panel also concludes, pursuant to staff rule 111.2(j), that a determination that the appellant's present illness is service-incurred was a matter not within its purview, the proper body to deal with it being the ABCC [Advisory Board on Compensation Claims] exercising its jurisdiction in accordance with the provisions of Appendix D to the Staff Rules.
>
> 36. The Panel further concludes that although the provisions of paragraph 16 of Annex I to ST/IC/86/27 apply

to the appellant's case, the appellant was not entitled to additional monetary compensation as she had been compensated for her higher level assignment by means of an SPA.

37. Furthermore, the Panel concludes that there is no basis for crediting the editorial assistant's services which the appellant had rendered in OUSGPGAA towards the completion of her trial period in DCS.

38. Accordingly, the Panel makes no recommendation in support of the appeal."

On 24 June 1988 the Under-Secretary-General for Administration and Management informed the Applicant that, having re-examined her case in the light of the Board's report, the Secretary-General had decided to maintain the contested decision. On 15 December 1989 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Chief of the Official Records Editing Section wilfully violated the Applicant's human rights, Administrative Instruction ST/AI/240/Rev.1 on performance evaluation reports and the Standards of conduct in the international civil service.

2. The Respondent failed to review the Applicant's appeal to the Joint Appeals Board fairly, independently and impartially pursuant to staff rule 111.2(g), thereby causing a miscarriage of justice in her appeal to the Joint Appeals Board.

3. The Joint Appeals Board failed to review the Applicant's appeal fairly, independently and impartially pursuant to staff rule 111.2(m), thereby causing a miscarriage of justice in her appeal to the Joint Appeals Board.

4. The Respondent failed to review the Joint Appeals Board Panel's recommendations fairly, independently and impartially, thereby causing a miscarriage of justice in the Applicant's appeal to the Joint Appeals Board.

5. The Respondent failed to rectify the gross injustices deliberately done to the Applicant since August 1984.

6. The Administration deliberately failed to make regular performance evaluation reports concerning the Applicant.

Whereas the Respondent's principal contentions are:

1. The claim concerning the alleged service-incurred illness is not properly before the Tribunal and should be referred to the Advisory Board on Compensation Claims.

2. No credible evidence has been adduced by the Applicant to establish that she has been subjected to harassment during her 15 months stay in DCS.

3. The Applicant was adequately compensated with a Special Post Allowance to the G-5 level during the period of 15 months when she was assigned on a G-5 post; this allowance had to be discontinued on reassignment to a lower level post.

4. The Applicant's request for reinstatement in a post at G-7 level retroactive from 1 January 1985, or compensation in lieu of such reinstatement, has no legal basis.

The Tribunal, having deliberated from 16 October to 12 November 1991, now pronounces the following judgement:

I. The Tribunal has taken the view that the preliminary measures requested by the Applicant and mainly concerned with the production of documents of various kinds need not be taken, as the information presented or made available to the Tribunal is adequate. For similar reasons, the Tribunal has declined to hold oral proceedings.

II. The Tribunal recalls at the outset that the Applicant requested her transfer out of the Official Records Editing Section by a memorandum dated 16 July 1984, signed by her and sent to Mrs. Del Gaudio, Administrative Officer of the Department of Conference Services. In the Tribunal's view, such a request bearing the signature of the Applicant must be considered the expression of her will unless it can be proved, as claimed by the Applicant, that the memorandum was signed under circumstances that prevented her from acting freely.

III. The Applicant claims that her transfer from the Official Records Editing Section was not voluntary and was brought about by ill-treatment by her supervising officer. In connection with this assertion, many inferences

of devious conduct have been suggested. In particular, much has been said about the Applicant's medical condition while she was working with the Official Records Editing Section, but the Tribunal notes that when the Joint Appeals Board heard the parties in an oral proceeding on 14 June 1988, there was no communication from any of the doctors suggesting that the Applicant's condition at the time of her move from the Official Records Editing Section in mid-1984 was directly due to the atmosphere and circumstances in which she was working. The only statement plainly attributable to Dr. Irwin (Director of the Medical Service of the United Nations) relates to a "request for extension of deadline for submission of appeal to the Secretary of the Joint Appeals Board". Dr. Irwin's comment that "I support Ms. Fallah's request (for medical reasons)" is dated 25 November 1987, i.e. more than three years after the date of the Applicant's transfer from the Official Records Editing Section.

IV. A hand-written certificate from Dr. Peter H. Gruen, a private doctor of the Applicant, came immediately after the Joint Appeals Board's oral proceeding, and it is silent on any advice he may have given to the Applicant that she should leave the Official Records Editing Section in mid-1984 because of health reasons due to the conditions and atmosphere in which she was working. Neither Dr. Irwin nor Dr. Laux (who succeeded Dr. Irwin as Director of the Medical Service) recorded any views about the health condition of the Applicant at the time of her leaving the Official Records Editing Section or about any advice they may have given her. The Applicant has, in her written observations dated 30 June 1991, attached a number of additional certificates from different doctors, but they are all dated long after August 1984. Besides, they do not say categorically that the Applicant was obliged to leave the Official Records Editing Section because of deterioration in her health following "constant harassment, humiliation and intimidation". Furthermore, those relatively recent certificates often relate to short leaves or absences from work, and seem to have been prepared with a view to helping the Applicant in seeking relief or compensation from the United Nations.

V. In the light of the above considerations and given the medical history of the Applicant, the Tribunal holds that, on the basis of available

evidence, it cannot be established that her requested transfer from the Official Records Editing Section was directly due to her deteriorating health condition at that time. The Applicant has not sought the help of the Advisory Board on Compensation Claims for a determination whether, and if so to what extent, her illness in 1983-1984 could be considered service-incurred.

VI. The Applicant also claims that she requested her transfer out of the Official Records Editing Section as a consequence of being subjected to a systematic skein of intrigue, harassment, discrimination and favouritism. She relies heavily on the following two assertions.

First, the Applicant alleges that the only purpose of the two memoranda dated 31 July and 2 August 1984 written by her supervisor, Mrs. Geneviève Vengeon, Chief of the Official Records Editing Section, relating to the recommendation of Mrs. Vengeon to withhold the Applicant's within-grade salary increment, was to intimidate and frighten the Applicant into leaving the Official Records Editing Section. The circumstances surrounding this incident were of special concern to the Tribunal because of apparent inconsistencies with the procedure that would normally be expected. However, the Tribunal was unable to find substantial evidence to support the allegation of intimidation; there is evidence, on the contrary, that the recommendation contained in the 31 July 1984 memorandum was submitted for the reasons indicated in it, but was not acted upon as the Applicant was leaving the Official Records Editing Section.

Secondly, the Applicant states that the draft memorandum dated 16 July 1984, purported to have been prepared by Mrs. Sewell (a former Personnel Officer for the Department of Conference Services), and the final memorandum of the same date, based on the earlier draft and textually identical, were prepared and signed in August 1984, although pre-dated 16 July 1984. Again, there is no satisfactory proof of this charge. Mrs. Sewell has stated in a communication dated 21 October 1991, received by the Tribunal through the Respondent, that she does not "recall ever having drafted a memorandum for Miss Fallah" and she categorically denies that "I ever pre-dated or post- dated any memorandum for or concerning Ms. Fallah in order to accommodate Ms. Vengeon, or for any other reason". The Applicant

contests the statement of Mrs. Sewell. However, the Tribunal finds no reason to believe that Mrs. Sewell acted in collusion with Mrs. Vengeon as has been alleged by the Applicant. The Tribunal holds therefore that all the allegations made about the memoranda sent by Mrs. Vengeon in July/August 1984 and about the "pre-dating" of the memorandum dated 16 July 1984 by Mrs. Sewell have not been substantiated.

VII. The Tribunal has thus examined these particular complaints of ill-treatment cited by the Applicant and finds that, in spite of some indications that the Applicant's tenure with the Official Records Editing Section was not congenial, all the allegations of deliberate wrong-doing to victimize the Applicant remain in the realm of conjecture. The Tribunal notes that the Applicant did not resort to the Panel on Discrimination and Other Grievances which the Joint Appeals Board said was "the most appropriate first body to approach at the time of alleged harassment so that it could set its investigative machinery in motion with a view to making a determination on the merit of the appellant's claims".

VIII. In the circumstances, the Tribunal concludes that the Applicant's request to be transferred out of the Offical Records Editing Section cannot be considered as having been made under duress.

IX. The next set of pleas relates to the Applicant's claim that she was (and is) entitled to have all the rights (including a Special Post Allowance) which she would have enjoyed had she not been transferred out of the Official Records Editing Section. The Applicant states that, even after leaving the Official Records Editing Section, she was entitled to a Special Post Allowance at G-5 as she was substantially and satisfactorily doing the same ype of work as she would have done had she remained in that section.

There is no record to show that, after leaving the Official Records Editing Section, the Applicant ever asked for a Special Post Allowance under staff rule 103.11 on the ground that she was performing duties higher than her job description or grade demanded. The Tribunal finds that the Applicant was not entitled to receive a Special Post Allowance after she moved from the Official Records Editing Section.

X. The Applicant argues that, since her work after leaving the Official Records Editing Section and from time to time resembled what she would have been doing in that section had she remained there, she should be credited with that period for the purposes of the training programme. However, this does not meet the requirements of the training programme. This point was emphasized by the Joint Appeals Board and later explained further in a letter of 7 September 1989 to the Applicant from the Assistant Secretary-General for Human Resources Management. This letter reads in part:

> "The purpose of the two-year training period required by the circular was to prepare successful candidates to assume the very technical functions of editorial assistants by the end of that period. Such training implies a continuous period of learning, which cannot be started, interrupted by more than five years, and completed at the convenience of a trainee."

XI. The Applicant was originally placed with the Official Records Editing Section in accordance with Information Circular ST/IC/80/79 of 28 October 1980 regarding the "Examination for Editorial Assistants" which the Applicant passed. The objective of this examination was "to select a small number of staff members for training and eventual assignment to posts as editorial assistants at the G-5 level in the Official Records Editing Section, Department of Conference Services". This Information Circular indicates that irrespective of what is stated in a notice issued the day before, the intention was to send all successful candidates for training in the Official Records Editing Section for a period of two years with a Special Post Allowance at the G-5 level. On successful completion of a period of training and on being recommended by the Office of Personnel Services, the candidates would be promoted to the G-5 level. The Applicant did not fulfil these conditions.

XII. In view of the nature of the training programme, as indicated by the Respondent, which it must be assumed the Applicant was aware of, she cannot now argue that simply because she was, after August 1984, doing some editorial work, she was entitled to (a) receive a Special Post Allowance, (b) be graded originally as G-5 without completing her training or be

promoted on the basis of a recommendation of the Office of Personnel Services, (c) be classified as G-7 because of the new classification which converted her old post in the Official Records Editing Section from G-5 to G-7, and (d) be given credit in full or in part for the incomplete training in the Official Records Editing Section in 1983-84.

XIII. The Tribunal notes that the Implementation Review Group found that the Applicant was not entitled to receive a Special Post Allowance under the training programme after she moved from the Official Records Editing Section. The Group determined that, while the Applicant's request for a Special Post Allowance should be denied, her request for relocation should be considered by the Career Development and Placement Unit; to date, nothing seems to have come out of such consideration as that Unit might have given to the question of the Applicant's relocation.

XIV. In the circumstances, the pleas of the Applicant for re-classification in order to obtain financial benefits for her work subsequent to her leaving the Official Records Editing Section cannot be sustained.

XV. The Tribunal finds that the procedures and methods followed by the Respondent in implementing the staff regulations and rules in respect of the Applicant were at times casual and at other times contradictory. Thus, no satisfactory explanations are available why regular and timely performance evaluation reports were not prepared, even if it were open to the Applicant to ask for them on her own initiative, as indeed she finally did on 18 June 1991. Similarly, the haste with which the report of the Joint Appeals Board was dealt with ill accords with the subsequent statement recorded by the Respondent that the Applicant's case "involves many factors" which apparently could not be adequately examined during many months before she went to the Joint Appeals Board. Furthermore, the Implementation Review Group recommended that the Applicant's "request for relocation should be considered" by the Career Development and Placement Unit. In the Respondent's reply to the Tribunal's query, it is stated that the two departments which could accommodate the Applicant showed no interest; however, in the background of this case, it appears that attempts made to

relocate the Applicant could be - and the Tribunal hopes would be - pursued more assiduously. Similarly, the absence of a performance evaluation report with respect to the period during which the Applicant worked in the Official Records Editing Section, as well as the related lack of opportunity for the Applicant to invoke the rebuttal procedure if she wished, and the Respondent's failure to place in the Applicant's file Mrs. Vengeon's memorandum of 31 July 1984 suggesting that the Applicant's within-grade salary increment should be withheld, cannot be considered as serving the ends of good administration. Other such instances could be cited.

While these deficiencies do not appear to have materially affected the Applicant's career, the Tribunal considers that the Applicant was nonetheless subjected to moral injury and lack of due process, for which she is entitled to some compensation. The Tribunal assesses this compensation at $ 3,000. However, the Tribunal does not find in this case the elements justifying an award of costs.

XVI. Accordingly, the Tribunal:

1. Orders the Respondent to pay compensation to the Applicant in the amount of $ 3,000.

2. Rejects all other pleas.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Samar SEN
Member

Luis de POSADAS MONTERO
Member

New York, 12 November 1991

Jean HARDY
Acting Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/546
14 November 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 546

Cases No. 588: CHRISTY
No. 589: THORSTENSEN
No. 590: WHITE

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Arnold Kean;

Whereas, on 28 February 1991, Lawrence Christy, a staff member of the Food and Agricultural Organization of the United Nations, hereinafter referred to as FAO, Svein Thorstensen, a staff member of the International Atomic Energy Agency, hereinafter referred to as IAEA, and Michael Robert White, a staff member of the International Maritime Organization, hereinafter referred to as IMO, filed applications containing the following pleas:

> "MAY IT PLEASE the presiding member to agree to the holding of oral proceedings in this case.
>
> AND MAY IT PLEASE the Tribunal:
>
> 1. To declare itself competent in this case;
>
> 2. To declare and judge the application receivable;
>
> 3. To order the rescission of the decision taken by the Standing Committee [of the Joint Staff Pension Board] acting on behalf of the Board, at its 171st meeting, held on 27 June 1990 in London, to confirm the decision of the Secretary of the Board to

apply to the Applicant, as from 1 February 1990, the pensionable remuneration scales for staff in the Professional and higher categories, obtained in accordance with the new rules (reducing the first adjustment due after 1 January 1990 by 2.8 percentage points and excluding the multiplicative factor of 1.22) contained in article 54(b) of the Regulations of the Fund, as amended by resolution 44/199 of the General Assembly of the United Nations on 21 December 1989, and not in accordance with the previous rules (including the multiplicative factor of 1.22, without reducing the due adjustments) contained in the said article 54(b) in force from 1 April 1987 to 31 December 1989, and to draw all the legal consequences of this rescission;

4. To award the Applicant, as costs, a sum payable by the Respondent, assessed at the time of submission of this application at forty thousand (40,000) French francs, subject to adjustment upon completion of the proceedings."

Whereas the Respondent filed his answer on 2 August 1991;

Whereas the Applicants filed written observations on 22 August 1991;

Whereas the Tribunal heard the parties at a public hearing on 25 October 1991;

Whereas additional information was submitted by the Respondent on 25 October 1991 and by the Applicants on 29 October 1991;

Whereas the facts in the three cases are as follows:

Lawrence Christy has been a participant in the Joint Staff Pension Fund as an FAO staff member since 19 January 1976; at the time of the contested decision, he was Chief of the Development Law Service, at the D-1, step III level. Svein Thorstensen has been a participant in the Fund as an IAEA staff member since 4 May 1969; at the time of the contested decision, he was Director, Division of Operations C, Department of Safeguards, at the D-1, step VIII level. Michael Robert White has been a participant in the Fund as an IMO staff member since 4 February 1973; at the time of the contested decision, he was Head of the English Translation Section, at the P-5, step IX level.

At its forty-first session, the General Assembly had approved a revised scale of pensionable remuneration for the Professional and higher categories effective 1 April 1987. At the same time, it had established a procedure for the adjustment of the scale between comprehensive reviews. As described by the International Civil Service Commission the adjustment procedure approved by the General Assembly provided for the scale of pensionable remuneration to be revised by reference to and on the same date as increases in net remuneration for United Nations officials in the Professional and higher categories in New York. Noting that remuneration was adjusted on a net basis while, since pensions were taxable in most countries, pensionable remuneration was determined on a gross basis, the Assembly decided that adjustments to pensionable remuneration would also need to be made on a gross basis. By comparison of the movement in United Nations net and gross remuneration, it was determined that a 5 per cent movement in the scale of pensionable remuneration corresponded to a 4.1 per cent adjustment in New York net remuneration (a 1.22 ratio). It was therefore decided that adjustments in pensionable remuneration would be based on the weighted average percentage movement in New York net remuneration multiplied by the above 1.22 factor.

The issue of pensionable remuneration for the Professional and higher categories, and more particularly the adjustment procedure, was considered by the International Civil Service Commission at its thirtieth session. In its report for the year 1989, volume I (A/44/30), the Commission noted the following developments subsequent to the implementation of the procedure:

> "30. The Commission noted that, since the implementation of the revised United Nations scale of pensionable remuneration on 1 April 1987, New York net remuneration had increased three times as a result of changes in post adjustment. This had resulted in a cumulative increase of 12.7 per cent, which, through the application of the 1.22 multiplicative factor, had produced a 15.5 per cent cumulative increase in pensionable remuneration. Over the same period, there had been two increases in pensionable remuneration (gross salary) in the United States federal civil

service, for a cumulative increase of 6.2 per cent. United Nations pensionable remuneration had thus been adjusted by a cumulative 9.3 percentage points beyond the adjustment applied to the comparator's scale.

31. The Commission noted that the above circumstances had led to a widening in the ratio of United Nations to United States pensionable remuneration from 119.7 when the April 1987 scale was adopted to 130.1 in May 1989. This widening in the United Nations/United States ratio of pensionable remuneration was due primarily to two factors: (a) the increase in the Washington/New York cost-of-living differential from 4.5 per cent in 1986 to 12.1 per cent in May 1989; and (b) the 1.22 multiplicative factor applied to the weighted average movement in United Nations net remuneration amounts in New York under the adjustment procedure for pensionable remuneration.

32. The Commission also noted that federal income tax brackets in the United States were now adjusted once a year for inflation. Consequently, salary increases corresponding to cost-of-living increases were no longer taxed at a higher rate. As a result the percentage increase in net salary was virtually the same as the percentage increase in gross salary. The above development suggested that the use of the 1.22 multiplicative factor to derive the percentage increase in United Nations pensionable remuneration from the percentage increase in New York net remuneration was no longer justified.

33. In reviewing this issue, the Commission further observed that income replacement ratios for United Nations staff had remained very close to their level when the General Assembly approved the revised scale of pensionable remuneration."

In the light of the foregoing, the Commission considered whether a modification should be made in the adjustment procedure, pending completion of the review of pensionable remuneration scheduled for 1990. After examining four alternative courses of action, the Commission decided to recommend to the General Assembly that any adjustment in pensionable remuneration due before completion of the 1990 review be made without application of the 1.22 multiplicative factor and that, in addition, the first such adjustment be reduced by 2.8 percentage points in order to remove the past impact of the 1.22 factor. By its

resolution 44/199 of 21 December 1989, section II, the General Assembly approved, pending the completion of the comprehensive review, the modification of the procedure for adjusting pensionable remuneration as recommended by the Commission, and it amended accordingly, with effect from 1 January 1990, article 54 of the regulations of the Fund by replacing paragraph (b) by the following text:

> "(b) In the case of participants in the Professional and higher categories, the scale of pensionable remuneration effective 1 May 1989, set out in the appendix hereto, shall be adjusted on the same date as the net remuneration amounts of officials in the Professional and higher categories in New York are adjusted. Such adjustment shall be by a uniform percentage equal to the weighted average percentage variation in the net remuneration amounts, as determined by the International Civil Service Commission, except that:
>
> (i) The amount of the first adjustment due after 1 January 1990 shall be reduced by 2.8 percentage points;
>
> (ii) The scale of pensionable remuneration determined by the International Civil Service Commission as corresponding to the revised salary structure entering into effect on 1 July 1990 shall become effective on the same date."

The new scale of pensionable remuneration became effective on 1 February 1990. In accordance with the General Assembly resolution, the increase in pensionable remuneration which, because of the 4.5 per cent average increase in New York net remuneration, should have been of 5.5 per cent (4.5 x 1.22), was reduced, first by 1 percentage point (4.5 x 0.22) owing to the elimination of the 1.22 multiplicative factor, and secondly by 2.8 percentage points in order to remove the past impact of the 1.22 factor, resulting in an overall reduction of 3.8 per cent. Accordingly, the increase in the scale of pensionable remuneration was only 1.7 per cent.

In May 1990 a number of staff members of various organizations, including the Applicants, addressed a letter to

the Secretary of the Joint Staff Pension Board, noting that, following the implementation, in their particular case, of the new scale of pensionable remuneration, the amount withheld from their salary as their Pension Fund contribution was 2.8 per cent [sic] lower than it would have been if the rules contained in the previous version of article 54(b) of the Regulations of the Fund had been applied, and that this caused them an injury since their pension rights and related benefits were thereby diminished. They added that the application, in their particular case, of the new scale was illegal; accordingly, they requested the implementation, in their case, of scales derived according to the former rules (including the 1.22 multiplier, without the reduction of future adjustments) contained in the previous version of article 54(b) of the Regulations of the Fund. In addition, they pointed out that their request should be construed as applying, not only to the month of February 1990, but to all the succeeding months as well, so long as scales derived according to the rules contained in the new version of article 54(b) of the Regulations of the Fund continued to be implemented in their case. On 1 June 1990 the Secretary of the Pension Board replied that he was required to apply the Regulations of the Fund as adopted, and from time to time amended, by the General Assembly; the Secretary therefore was constrained to apply in their case, for both contribution and benefit purposes, the scale of pensionable remuneration as in force on 1 February 1990, in accordance with the provisions of article 54(b)(i) of the Regulations. The Applicants subsequently requested a review of the Secretary's decision by the Standing Committee of the Pension Board. On 24 July 1990 the Secretary advised them that the Standing Committee, at its 171st meeting held in London on 27 June 1990, had decided to uphold the Secretary's decision to apply, in their case, the scale of pensionable remuneration for the Professional and higher categories effective 1 February 1990 as determined by the International Civil Service Commission, on the grounds that the Secretary was constrained to apply that scale pursuant to

article 54(b) of the Regulations of the Fund, as amended by the General Assembly through resolution 44/199 of 21 December 1989. On 28 February 1991 the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The contested decision disregards the principle of non-retroactivity of adverse decisions.

2. The application of the contested decision to the Applicants, following the series of adverse measures taken since 1982, violates the Applicants' rights inasmuch as it disregards the obligation incumbent upon the Fund to maintain a just and effective pension system.

3. The Respondent, in taking his decision, omitted certain essential facts.

4. The Respondent, in taking his decision, drew certain manifestly erroneous conclusions from the file.

Whereas the Respondent's principal contentions are:

1. There was no violation of the principle of non-retroactivity.

2. The Applicants' right to an "effective and just" pension system was not breached.

3. There was no omission of any essential fact.

4. No erroneous conclusions were drawn from the evidence.

The Tribunal, having deliberated from 24 October to 14 November 1991, now pronounces the following judgement:

I. The applications in cases No. 588, Christy, No. 589, Thorstensen, and No. 590, White, present similar facts and identical issues. Accordingly, the Tribunal finds that joinder of these applications would be appropriate, and they will, therefore, be considered together.

II. Each of the applications contests the validity of a decision by the Standing Committee of the United Nations Joint Staff Pension Board ("Board") affirming action by the Secretary of the Board adhering to the revised scale of pensionable remuneration for Fund participants in the Professional and higher categories which was established by General Assembly resolution 44/199 dated 21 December 1989, effective as of 1 January 1990. That resolution amended article 54(b) of the Joint Staff Pension Fund ("Fund") Regulations, and the revised scale was made effective by the Board one month later on 1 February 1990.

III. The amendment of the Fund Regulations relevant to these Applications dealt with the adjustment procedure used in determining pensionable remuneration, which is the figure representing the earnings of a staff member used as the basis for calculating the staff member's contribution to the Fund and the pension itself when that becomes payable.

IV. Both before and in connection with this amendment of the Fund Regulations, the theory underlying the methodology for determining pensionable remuneration and the related adjustment procedure was that, for each grade and step, the level of pensionable remuneration should result in a pension in U.S. dollars whose proportional relationship to the corresponding net remuneration in New York, a ratio known as the "income replacement ratio", would be comparable to the ratio of pension to net remuneration for their counterparts in the United States Federal Civil Service. The General Assembly has looked upon the United States Federal Civil Service as the comparator for the purpose of determining appropriate remuneration and pension levels for the Professional and higher level participants in the Fund. Although the General Assembly did not in amending the Fund Regulations specify a margin range in relation to the U.S. comparator for pensionable remuneration as it had in the past for

net remuneration, cf. Judgement No. 370, Molinier (1986), it requested in 1986 the International Civil Service Commission, in cooperation with the Board, to

> "monitor regularly the pensionable remuneration for staff in the Professional and higher categories of the United Nations and that of the United States federal civil service employees in comparable grades, and to report thereon to the General Assembly as appropriate." General Assembly resolution 41/208, 11 December 1986.

V. Effective 1 April 1987, the General Assembly established a scale of pensionable remuneration and a related adjustment methodology for Fund participants which took into account comparable income replacement ratios as between the United Nations and the United States comparator. The General Assembly did so by providing for an adjustment in pensionable remuneration when the weighted average net remuneration was adjusted. The corresponding pensionable remuneration adjustment consisted of a uniform percentage equal to the product of the weighted average change in the net remuneration in New York multiplied by 1.22. The 1.22 multiplier represented an attempt to compensate for a pre-existing United States income tax law feature which had the effect of distorting the relationship between United States Federal Civil Service net remuneration and counterpart United Nations net remuneration. This distortion occurred because the progressive nature of United States income tax rates had the consequence of causing a 5 percent increase in gross remuneration for employees of the United States Federal Civil Service to be reduced to approximately 4.1 percent of net remuneration. Accordingly, to maintain the comparability of the income replacement ratios between the United Nations and the United States Federal Civil Service, it was deemed necessary to multiply any weighted average percentage change in United Nations net remuneration in New York by 5 divided by 4.1, or 1.22.

VI. In 1989, the General Assembly, after considering the views of the Board and the International Civil Service Commission as

well as others -- not all of which were unanimous --, decided to eliminate for the future the 1.22 multiplier described above. In addition, the General Assembly decided that the use of the 1.22 multiplier since 1 April 1987 had distorted in an unacceptable manner the relationship between the United Nations and the United States comparator service with respect to pensions and the income replacement ratio.

VII. The reason for this was that, before 1988 when the first of three pensionable remuneration adjustments involving application of the 1.22 mutiplier was made, a change in the United States income tax laws indexing tax rates to changes in the cost of living to take account of inflation reflected in taxable income had removed the reason for the 1.22 multiplier. That is to say -- the change in the United States income tax law was seen by the General Assembly as permitting a 5 percent increase in gross remuneration for the United States Federal Civil Service to remain a net 5 percent increase in net remuneration. Thus, as the General Assembly saw it, given the original reason for use of the 1.22 multiplier in determining pensionable remuneration, its continued use would serve no purpose other than to provide an uncalled-for increase in pensionable remuneration and, in turn, would undermine and distort the income replacement ratio concept on which the pension system was premised. In keeping with this rationale of restoring a proper relationship between the United Nations and the comparator service, the General Assembly concluded that it should eliminate not only the 1.22 multiplier for the future but that it should also remove prospectively what it perceived as the past impact of the unjustified adjustments which had occurred in 1988 and 1989 as a result of the application of the 1.22 multiplier. Had this step not been taken, the effect of the 1988 and two 1989 adjustments would have compounded in the future, creating an even greater distortion. Thus the General Assembly resolution of 21 December 1989 subtracted from the first upward adjustment in pensionable

remuneration after 1 January 1990 2.8 percentage points, representing the prior use of the 1.22 multiplier. The consequence of this was that when the weighted average net remuneration in New York was increased by 4.5 percent on 1 February 1990, pensionable remuneration was increased by 1.7 percent (4.5 - 2.8).

VIII. The applications attack both aspects of the General Assembly's action referred to above on various grounds. First, the applications assert that the removal of the 1.22 multiplier effective 1 January 1990 and the deduction of 2.8 percentage points from the 1 February 1990 adjustment in pensionable remuneration violated the principle of non-retroactivity. This principle is codified in article 49(b) of the Fund Regulations, which provides that the Regulations as amended by the General Assembly "... shall enter into force as from the date specified by the General Assembly but without prejudice to rights to benefits acquired through contributory service prior to that date." The Tribunal must consider, therefore, whether either of the changes made by the General Assembly is in conflict with the language of article 49(b) quoted above.

IX. With respect to elimination of the 1.22 multiplier effective 1 January 1990, the Tribunal concludes that this action was within the authority of the General Assembly under article 49. The Tribunal has previously held that prospective action of this nature is not in conflict with the principle of non-retroactivity. See Judgement No. 404, Brede II (1987), para. XI; Judgement No. 406, Cabrera (1987), paras. VIII and IX; Judgement No. 395, Oummih (1987), paras. XI, XX and XXV; Judgement No. 370, Molinier (1986), paras. XLI-XLIII; Judgement No. 360, Taylor (1985), Separate Opinion of Mr. Roger Pinto, paras. V, VII and IX, and Judgement No. 82, Puvrez (1961).

X. With respect to the deduction of 2.8 percentage points from the 1 February 1990 adjustment in pensionable remuneration, the

question whether there was a violation of article 49(b) is also governed by the above judgements and the authorities referred to in the separate opinion of Mr. Pinto in Taylor. On this point, it is acknowledged by the Respondent that the change in article 54(b) of the Fund Regulations by the General Assembly was intended to neutralize for the future the past impact of prior pensionable remuneration increases which the General Assembly considered to have been unjustified because of its belief that the premise on which they had been made became invalid as a result of a change in U.S. income tax laws. It has been contended that this is tantamount to a retroactive reduction in pensionable remuneration which is prohibited by article 49(b) because, as a practical matter, reducing a future upward adjustment arguably has almost the same effect. If valid, that same argument would have led to different conclusions from those reached in the cases cited above, and in the separate opinion of Mr. Pinto in Taylor.

XI. On the other hand, viewed literally, the General Assembly's action did not affect any rights to benefits acquired through contributory service prior to 1 January 1990. As far as each Fund participant was concerned, the amount credited to his or her account with respect to the period prior to 1 January 1990 was calculated in accordance with the Fund Regulations as they then existed. Indeed, any Fund participant who retired prior to or, under certain circumstances, after 1 February 1990 would have received a pension which reflected adjustments before 1990 in pensionable remuneration employing the 1.22 multiplier, or if he died, his heirs would have received a benefit calculated similarly. Moreover, it is clear from the Tribunal's past decisions referred to above that the General Assembly has the authority in appropriate circumstances to make prospective changes, including reductions in pensionable remuneration or in pension adjustments or post adjustments, or to suspend or freeze their application. There is no significant difference of principle as between those cases and this. The Tribunal therefore concludes that the reduction in the

1 February 1990 adjustment by 2.8 points did not violate article 49(b). Its effect was lawfully to provide for the future a smaller increase in pensionable remuneration than would otherwise have occurred, and this was done solely for the purpose of attempting to maintain a proper relationship between United Nations and common system pensions and those of the United States comparator service.

XII. Contrary to the dissent in the present case, the Judgement in Taylor does not, in the opinion of the majority, support the result proposed by the dissent. Taylor involved a right that Mr. Taylor had before his separation which he subsequently sought to exercise when he resumed his employment with the Organization at a later date. The question in that case was whether the General Assembly had intended to extinguish that right when, between the time of Mr. Taylor's separation and the resumption of his employment, the General Assembly prospectively abolished such rights. The Tribunal held that such a retroactive effect had not been intended by the General Assembly. That situation is quite different from this case. Here, as noted above, pensionable remuneration amounts determined before the effective date of the General Assembly's resolution were unaffected, and those who became entitled to payment of pension benefits prior to that date received them on the basis of those amounts. Moreover, even after the effective date, there was no change in the pensionable remuneration amounts with respect to prior periods. The General Assembly resolution affected only the determination of pensionable remuneration with respect to future periods, and there is no question at all of extinguishing an unexercised right of any staff member which the staff member sought to exercise.

XIII. The Applicants assert that the changes made by the General Assembly which they challenge are in violation of the Applicants' right to the maintenance of an effective and just pension system. The Tribunal has previously held and reiterates that the Fund is

under an obligation to maintain an effective and just pension system. But this does not mean that the system may not be modified so long as the modifications are not arbitrary, are in conformity with the object of the pension system, and promote implementation of the principles laid down in Article 101 of the United Nations Charter.

XIV. The Tribunal is unable to find on the facts of this case any violation of these principles. It is within the province of the General Assembly, following advice of the International Civil Service Commission, the Board and others, to make reasoned judgements with regard to the pension adjustment system as it did here, which it viewed as correcting a feature introduced in 1987 that had become erroneous by the time it was applied in 1988 and 1989. It is not for this Tribunal to attempt to evaluate the complex considerations involved in making determinations as to comparable income replacement ratios, or the effect on comparable pensions of changes in the United States tax laws, or similar matters. These are properly matters for the General Assembly's judgement. And it is surely not within the competence of this Tribunal to substitute its judgement for that of the General Assembly with respect to matters of that nature.

XV. Once it is clear, as it is here, that modifications are not arbitrary or abusive, but instead have a reasonable basis and are in conformity with the objectives of the pension system, there is no occasion for the Tribunal to intervene. Increases in pensionable remuneration resulting from unjustified adjustments are not among the objectives of the system. It cannot be said, therefore, that the modifications here are in conflict with any principles laid down in the United Nations Charter, much less that they can reasonably be regarded as improperly unfavourable to staff members, or destructive of staff members' rights to a pension system. On the contrary, nothing in the Charter or in

common sense suggests that prospective correction of flawed past procedures or reasonable changes which result from unforeseen developments are necessarily prohibited.

XVI. The Applicants also contend that, in deciding to make the changes complained of, the General Assembly omitted consideration of essential facts and drew manifestly wrong conclusions from the evidence before it. In essence, the first of these arguments by the Applicants asks the Tribunal to evaluate the judgement of the General Assembly in deciding to act as it did even though a comprehensive review of the subject of pensionable remuneration was being carried out. This argument is lacking in merit. It is not within the competence of this Tribunal to inquire into judgements by the General Assembly as to when it wishes to act with respect to a particular matter.

XVII. Finally, in arguing that the General Assembly's action was unlawful because it allegedly drew erroneous conclusions from the facts before it, the Applicants are again asking this Tribunal to substitute its judgement for that of the General Assembly with regard to the conclusions to be drawn from the facts before it and the recommendations received by it from the Board, the International Civil Service Commission, and others and to substitute its judgement for that of the General Assembly with respect to its evaluation of the United States Federal Civil Service as the comparator and the effect of changes in United States income tax laws. In this regard, the Tribunal notes some inconsistency in the position of the Applicants in seeking, on the one hand, to continue to benefit from an adjustment that stemmed from the use of the U.S. Federal Civil Service as a comparator, and, on the other hand, to object to the use of that comparator by the General Assembly in deciding to eliminate the same adjustment. In any event, however, the conclusions to be drawn from the facts are matters for the General Assembly to decide -- not this Tribunal.

XVIII. For the foregoing reasons, the applications are rejected in their entirety as is the plea for costs.

(Signatures)

Jerome ACKERMAN
Vice-President

Arnold KEAN
Member

New York, 14 November 1991

Jean HARDY
Acting Executive Secretary

DISSENTING OPINION OF MR. ROGER PINTO

(ORIGINAL: FRENCH)

I. I regret that I must disagree, at least in part, with the majority.

II. The Applicants contest the application to them of section II of General Assembly resolution 44/199 of 21 December 1989, on the one hand because it eliminates the 1.22 multiplicative factor previously established by article 54 (b) of the Regulations of the United Nations Joint Staff Pension Fund (hereinafter the "Regulations of the Fund") for the adjustment of their pensionable remuneration, and on the other because it adds to that provision a new subparagraph (i) stating "The amount of the first adjustment due after 1 January 1990 shall be reduced by 2.8 percentage points". My dissent relates only to the latter issue.

III. The Respondent has stated that these measures were not taken for financial reasons or for the sake of economy. He asserts that even if those two measures had not been adopted, the actuarial balance of the Fund would not have been threatened. The Secretary of the Pension Board, Mr. Gieri, stated during the oral proceedings that the measure had not been intended as a means of dealing with a financial crisis. He further stated:

> "This was not a measure to reduce the actuarial imbalance of the Fund. This was a comparison of the United Nations/United States situation". (AT/PV/154, p. 35)

IV. The parties agree that amendments to the Regulations of the Fund must not have a retroactive effect when applied to participants. The principle of non-retroactivity is established in article 49 (b) of the Regulations of the Fund. But it is general in scope, as the Respondent has acknowledged in the course of a number of proceedings before the Tribunal. It has been the Tribunal's consistent practice to confirm without ambiguity the principle of non-retroactivity as a general principle of law, which is applicable even in the absence of a text (Judgements No. 82, Puvrez (1961); No. 202, Quéguiner (1975); No. 273, Mortished (1981); No. 360, Taylor (1985); No. 370, Molinier (1986); No. 378, Bohn (1986); No. 379, Gilbert (1986); No. 395, Oummih (1987) and No. 404, Brede II (1987)). The practice of the Administrative Tribunal of the ILO likewise confirms the principle of non-retroactivity.

V. With regard to the 1.22 multiplicative factor, General Assembly resolution 44/199 amends article 54 (b) of the Regulations of the Fund by eliminating that multiplicative factor for the future exclusively. This measure is therefore not retroactive in character.

VI. The amendment of the pension system falls within the jurisdiction of the General Assembly. It is not for the Tribunal to express a view as to the advisability of measures taken in

that regard. As the Tribunal affirmed in its Judgements No. 378 and No. 379 and reaffirmed in its Judgement No. 404, the Fund is under an obligation to maintain "an effective and just retirement pension system", notably "with respect to the pension adjustment system".

VII. The contested amendment to the Regulations - elimination of the 1.22 multiplicative factor - is not arbitrary or unreasonable in character. It is consistent with the general pensions policy. Its application to the Applicants thus entails no violation of the law. On this point I concur with the judgement.

VIII. The Applicants contest, secondly, the application on 1 February 1990 of a 2.8 per cent reduction coefficient in the calculation of their pension adjustment pursuant to the 1989 amendment to article 54 (b) of the Regulations of the Fund.

IX. The principle of non-retroactivity is formally respected in time, since the new provisions apply only from 1 February 1990 onwards.

X. On the other hand, the principle is undeniably violated as regards the content of the new provision.

XI. The basically retroactive character of this provision appears clearly in the 1989 report of the International Civil Service Commission, Volume I (A/44/30, para. 42), in which the Commission recommends the 2.8 percentage points reduction "in order to remove the past impact of the 1.22 factor" (emphasis added).

XII. This retroactive character is acknowledged by the Respondent in his answer (para. 19):

> "The 2.8 percentage point 'excess' was due, as indicated earlier, to the failure to eliminate the 1.22 multiplicative factor when changes in US tax laws so warranted".

XIII. In other words, everything takes place as though the 1.22 multiplicative factor had been eliminated from 1987 onwards by the amendment of article 54 (b) of the Regulations of the Fund. However, that amendment was not made until 1989. Until it was amended by a decision of the General Assembly in that year, the text read as follows:

> "Such adjustment of the pensionable remuneration shall be by a uniform percentage equal to the weighted average percentage variation in the net remuneration amounts, as determined by the International Civil Service Commission, multiplied by 1.22".

XIV. As a result of the 2.8 percentage points reduction in the adjustment of 1 February 1990, the Respondent applied retroactively the elimination of the 1.22 factor.

XV. Acknowledging the validity of such a step would clearly deprive the principle of non-retroactivity of its substance. The system adopted eliminates retroactively the effects already produced by the application of the rules in force in the past from 1987 to 1989. Those rules were in fact applied, three times, at the time of each adjustment, to each Applicant by decision of the Fund - as the Respondent himself acknowledged in the oral proceedings.

XVI. Moreover, the application of the 2.8 reduction coefficient to the Applicants adversely affects their acquired rights.

XVII. In effect, as the Respondent himself acknowledges, the 1.22 multiplicative factor was applied to each of the Applicants individually from 1987 to 1989 in connection with the periodic adjustment of their pensionable remuneration. They thus acquired a right to the maintenance of the adjustments from which they had benefited in accordance with article 49 (b) of the Regulations of the Fund.

XVIII. A refusal to allow the Applicants to benefit from this right would run counter to the established practice of the Tribunal (see para. IV above). In particular, in Judgement No. 360, Taylor (1985), the Tribunal sanctioned the maintenance of a right that was simply conditional. The Tribunal expressed itself as follows with regard to the right in question:

> "Admittedly, this right was conditional ... . Nevertheless, it was a right, and an important one at that" (para. XIX, in fine).

It would be inconceivable that the Applicants could be deprived of the rights they had acquired by virtue of the adjustment decisions from which they had benefited.

XIX. The Respondent does not contend that in applying the 1.22 multiplicative factor to the Applicants from 1987 to 1989 he committed an error of law. He likewise does not contend that he committed a clerical or arithmetical mistake.

XX. During the oral proceedings Mr. Gieri replied most candidly when asked why nothing had been done between 1987 and 1989 to amend article 54 (b) of the Regulations of the Fund:

> "The only way I could answer that question, in all candour, ... is to say that the system was allowed to drift. If that was negligence on the part of the two reviewing bodies, so be it." (AT/PV.154, p. 39).

This negligence continued for three years.

XXI. The Administration, not the Applicants, is responsible for that situation. The Administration cannot make the Applicants bear the burden of this responsibility by means of a misuse of procedure.

XXII. If indeed the Respondent had directly annulled the adjustments made from 1987 to 1989, this retroactive measure would have been taken in violation of the Applicants' acquired

rights. By making the 2.8 percentage points reduction, the Respondent achieves indirectly what he could not have done directly. I view this as a real sleight of hand.

XXIII. The Respondent has thus not only violated the principle of non-retroactivity and the acquired rights of the Applicants, but has also committed a misuse of procedure. He has infringed the right of due process.

XXIV. There may seem to be no harm, in the case in point, to allow the Administration to apply retroactively a "system" which it had "allowed to drift." But the law has its reasons and it is with these reasons alone that the Tribunal must concern itself. Such a violation of law, if allowed to stand, would open the way to abuses of all kinds.

XXV. In my view, the pleas of the Applicants concerning the 2.8 percentage points reduction of the adjustment of 1 February 1990 should therefore be allowed. That reduction should not be applied to them.

(Signatures)

Roger PINTO
President

New York, 14 November 1991

Jean HARDY
Acting Executive Secretary